No. 91-1799

In THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

CLEMENT J. PACYNA, PETITIONER

v.

JOHN O. MARSH, Jr., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Reply to Brief in Opposition

CLEMENT J. PACYNA, Pro Se
1151 Wehrle Drive
Williamsville, New York 14221
(716) 632-4078

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A3) is unpublished but the decision is noted at 956 F.2 1160 (Table). The decision of the district court (Pet. App. C1-C4) is also unpublished.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1992. A petition for rehearing was denied on February 20, 1992.

The petition for writ of certiorari was filed on May 8, 1992. The Respondent's brief in opposition was filed on July 21, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

REBUTTAL

POINT I

THE RESPONDENT'S ARGUMENT CONCEALS THE DUE PROCESS CONSTITUTIONAL RIGHTS QUESTION IN ISSUE FOR ITS OWN AGGRANDIZEMENT IN THIS ACTION SEEKING RULE 60(b)(4)(6) RELIEF.

Contrary to the Respondent's argument at the outset at 8 and throughout 8-12, review is warranted by this Court in the public interest for reasons mentioned in detail in Petitioner's (Pet.) Brief and briefly as follows:

1. The district court clearly violated sovereign immunity (10)*. It had no jurisdiction from the outset of any action under 28 U.S.C. 1346 to dismiss Pet. suit barred by limitations, when no such action was on the calendar, as the only action before that court was one for judicial "review of a final decision

* Indicates page(s) to Pet. Brief.

of the Secretary of the Army."

2. In support, the district court's own Memorandum Decision (Pet. App. D1), as well as the Complaint on record, at the outset states: "In this case, plaintiff seeks review of a final decision of the Secretary of the Army."

3. The action for review accrued in 1982 (Pet. App. G1-G2) when the agency denied the claim (13), not in 1952 or 40 years ago; is conferred by 5 USC 702, 10 USC 1552 and 28 USC 1361 (3), not §1346; and when filed in 1983 was not estopped by limitations/res judicata.

4. Further, as the agency's final decision in 1982 (Pet. App. G1-G2) clearly shows that Pet. had not been appointed to a position (he had no contract), he did not or could not state an enforceable claim or waiver not exceeding $10,000 upon which relief could be granted required by §1346 (9-10,15,27).

5. It is well established in U.S. Supreme Court decisions and other authorities that a judgment lacking express grant of Congress is

void, that jurisdiction cannot be waived, that an action to vacate for voidness is not estopped by limitations or res judicata and that a direct or collateral attack may be taken at any and all times under Rule 60(b), (26-28).

As such, the district court's denial of Rule 60(b) relief is an abuse of discretion.

POINT II

ON THE QUESTION PRESENTED WHETHER MILITARY PERSONNEL SHOULD BE DENIED JUDICIAL REVIEW WHEN SEEKING ONLY EQUITABLE RELIEF FOR CONSTITUTIONAL, STATUTORY OR REGULATORY VIOLATIONS COMMITTED BY THEIR SUPERIOR OFFICERS.

Completely untrue is the Respondent's argument at 12. The end result of the litigation by whatever action taken by this Court on the petition now before it should not be the same.

The record and Pet. Brief (23-26) show that the Army violated its own Army Regulation (AR) 600-148 and due process rights prejudicial to Pet. appointment. The Respondent denied the claim (Pet. App. G) in violation of its mandate pursuant to AR 15-185.

The violations briefly are: (1) No required

reasons were given for disapproval of Pet. appointment after being selected (Pet. App. F); (2) the final ruling body did not act on a complete application as required; (3) The incomplete application was not returned to Pet. as required; and (4) Pet. was ordered "not to question higher authority."

The review claim, supra, has not been litigated by this Court or any prior court. Congress has conferred jurisdiction upon Federal courts to compel Board compliance of its mandate, supra (24).

CONCLUSION

The judgment of the court of appeals insofar as it affirmed the unpublished decision of the district court denying Rule 60(b)(4)(6) relief, should be reversed and the case be remanded to the Secretary of the Army or the Board.

Respectfully submitted.

S/Clement J. Pacyna
T/CLEMENT J. PACYNA, Pro se
1151 Wehrle Drive
Williamsville, N.Y. 14221
(716) 632-4078

Dated: August 10, 1992